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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)

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Reexamination of the Comparative)
Standards of Noncommercial)
Educational Applicants)

MM Docket No. 95-31

To: The Commission

**COMMENTS OF
WEST COAST PUBLIC RADIO AND ROCKY MOUNTAIN PUBLIC RADIO
ON SELECTION PROCESS FOR COMPETING APPLICATIONS**

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West Coast Public Radio and Rocky Mountain Public Radio (collectively, "WCPR & RMPR"), by their counsel, submit these joint comments in response to the Commission's *Further Notice of Proposed Rulemaking* in MM Docket No. 95-31 ("*NPRM*"), which sought additional comment on the process for choosing among competing applicants for noncommercial educational (NCE) broadcast stations.

Introduction and Summary

WCPR and RMPR are regional membership organizations for public radio stations in the West Coast and Rocky Mountain areas of the country. WCPR and RMPR represent 44 noncommercial educational radio station licensees whose combined stations total nearly 100. As membership organizations, WCPR and RMPR are vitally interested in preserving the fairness of any process for choosing among competing applications for NCE stations, so that WCPR and

RMPR member stations will have opportunities to grow and expand public radio service in the West Coast and Rocky Mountain areas.

WCPR and RMPR agree with and support the thrust of the comments of National Public Radio ("NPR"), America's Public Television Stations ("APTS") and the Corporation for Public Broadcasting ("CPB") in this proceeding, but comment separately based on their members' past collective experience with mutually exclusive ("MXed") NCE proceedings. Moreover, WCPR & RMPR felt obliged to comment directly in this proceeding because of their member stations' vital interest in it, given its impact on their future -- and the future of public broadcasting. WCPR & RMPR support a point system that would sustain the bedrock principles that underlie the reservation of channels for noncommercial educational use -- localism (including points for local applicants, local funding, local directors and officers, local educational presence and local representativeness), diversity, and spectrum efficiency. These factors are not new -- analysis of the Commission's past hearing decisions on NCE comparative cases demonstrates that these types of factors have been decisional in the past when the Commission decided among competing NCE applicants. What is new is the application of these factors in a manner and using a process allowing efficient evaluation by the FCC.

ARGUMENT

A. The Commission Should Adopt a Point System to Decide Among Competing NCE Applicants

WCPR & RMPR believe that use of a point system to decide among NCE applicants would best serve the public interest while preserving the special mission and structure of noncommercial educational broadcasting. After careful consideration of the hearing and lottery

alternatives set forth in the NPRM, WCPR & RMPR believe that both of those approaches should be rejected in favor of a properly crafted point system.

Traditional Comparative Hearings. For many decades, the Commission used traditional comparative hearings to decide among MXed broadcast applicants, including MXed NCE broadcast applicants, even though different decisional criteria were applied to NCE stations.^{1/} While many of WCPR & RMPR's member stations had previously supported such hearings as the best way to decide among NCE applicants, WCPR & RMPR believe that current circumstances require use of a different decisional system, albeit one that promotes the underlying assumption that not all qualified applicants are equally preferred for channels, especially those reserved for NCE use.

First, for the obvious reasons cited in the NPRM (delays, costs on applicants and burdens on staff resources), comparative hearings have fallen into disfavor. Second, while in the past, NCE hearings were actually uncommon,^{2/} the protracted length of this proceeding (and its precursor in GC Docket 92-52) and the 1995 processing freeze on MXed applications have resulted in a large backlog of MXed applications.^{3/} Resolution of these applications would expedite new service, including service to many areas without any public broadcasting service.

^{1/} For over twenty-five years -- from the seminal *New York University* case in 1969 until the processing freeze in 1995, the FCC decided mutually exclusive NCE proceedings by comparative hearing. As shown by prior comments in this proceeding, the majority of MXed NCE applications did not result in FCC decisions -- most cases settled.

^{2/} As shown in the comments of NCE Licensees in GC Docket 92-52 in 1992, most NCE comparative proceedings resulted in settlements before hearings. We incorporate by reference those comments and attached appendix of NCE cases.

^{3/} See footnote 11 of the NPRM.

Third, the current state of indecision on the criteria for deciding among NCE applicants is creating an huge influx of unqualified or marginally qualified NCE applicants. WCPR & RMPR believe that a large portion of these applications are by speculators (some of whom appear to be backed by commercial radio enterprises) or other inexperienced entrants that may not be able to effectuate their proposals, not traditional NCE applicants. This would explain the huge increase in the number of NCE applications filed in the past few years.^{4/}

Lotteries. WCPR & RMPR strongly believe that lotteries should not be used to decide among NCE applicants.

First, the "ownership" structure of NCE licensees does not lend itself to easy analysis in the context of "diversification of ownership," as set out in the Commission's current rule-making authority. The locus of "control" necessary to determine *de jure* and *de facto* control for purposes of applying the lottery statute is numbingly complicated because NCE licensees come in all shapes and forms: state-owned broadcasters (who may have directors appointed by a governor or the state legislature), public universities, private universities, school boards elected locally, non-profit organizations with self-perpetuating governing boards, and non-profit organizations with governing boards elected by their membership or by other constituent organizations. WCPR & RMPR do not believe that the Commission can fairly apply a "diversification" preference for a lottery for MXed NCE applications without inadvertently disadvantaging NCE ownership structures that have proved useful models for successful, long-term NCE broadcast station operation in the past. Moreover, WCPR & RMPR cannot conceive

^{4/} *Id.*

of a reasonable way to prevent manipulation of "control" by an unscrupulous applicant seeking to obtain a statutory preference that does not involve intrusive individual factual analysis by Commission staff.

Second, the Commission's current lottery authority, as applied, also suffers constitutional infirmities given the U.S. Supreme Court decision in *Adarand*. The Commission's interest in expediting new NCE service to the public (including first NCE service to many areas) by resolution of the backlog of NCE MXed cases (and the growing number of MXed applications) would not be served by postponement pending completion of FCC studies on minority preferences and perhaps a protracted court challenge to the lottery standard. The Commission must keep in mind that proceedings on the criteria for deciding among NCE MXed applications has already been seven (7) years in the making, as initial comments were filed in 1992 in GC Docket 92-52.

Third, the very nature of "random selection" in a lottery is antithetical to the history and mission of NCE broadcasting. It does not comport with Congress' and the Commission's historic recognition of the special nature of NCE broadcasting, and the scarcity of frequencies reserved for NCE use. Moreover, lotteries -- even weighted lotteries -- would strongly disfavor public broadcasters like the member stations of WCPR & RMPR, who historically operate in states or regions and apply for new stations only within those areas (and who typically do not compete with each other over frequencies), in favor of NCE broadcasters that use a "scatter shot" approach of filing multiple applications on a nationwide basis in the hopes that some of the applications would be granted. Lotteries are thus incompatible with the manner in which NCE

broadcasting has developed nationwide. Any lottery system would be ripe for abuse and speculation.

The information supplied in footnote 11 of the NPRM and further analysis of data on MXed NCE applications on the FCC's website supports WCPR & RMPR's concern about abuse. In fact, WCPR & RMPR suggest that part of the reason for the dramatic increase in NCE applications in 1997 and 1998 has been speculation that the FCC would adopt some sort of lottery system for deciding among MXed NCE applicants. Analysis of data on the FCC's website on MXED NCE radio applications demonstrates that over 400 of the competing applications involve largely 15-20 radio applicants who have overfiled each other in virtually every state.^{5/} The majority of these applications have been filed since the 1995 "freeze" on processing MXed NCE applications.

Finally, and most importantly, WCPR & RMPR believe that not all applicants that "qualify" as NCE licensees are equally preferable licensees for a particular frequency in a particular area -- there are gradations among applicants. WCPR & RMPR believe that "serving the public interest" in the NCE context means that the Commission must develop a system that chooses the applicant likely to provide the best NCE service to the community. The point system set forth below supplies such a system.

B. Point System.

Where there are mutually-exclusive applications by noncommercial educational broadcasters for reserved NCE frequencies, WCPR & RMPR strongly support a point system.

^{5/} See <http://www.fcc.gov/mmb/asd/welcome.html/NEWSBOX>. See also Exhibit A.

The point system should seek to choose the applicant that best serves the public interest goals of localism, diversity of viewpoints and spectrum efficiency, as follows:

1. Localism

* Local Applicant Credit. A point should be awarded to applicants with a Local headquarters, including a Local headquarters for the applicant's Parent(s). "Local" shall be defined as (a) located within 100 miles of the proposed facilities or located within the same state or (b) within the same state or in a bordering community if the proposed facilities are part of a State-Wide Plan, or (c) located within the same state as part of an established state or regional network. A "State-Wide Plan" should be defined as an existing education plan of a state, municipality, state governmental agency, or public educational institution. A "Parent" of an applicant, in the noncommercial context, should be defined as an entity that selects or approves a majority of the directors and/or governing board members of the applicant or otherwise controls the applicant.

* Local Directors and Officers Credit. A point should be awarded to applicants (a) for which at least seventy-five percent (75%) of the officers or director (or members of the governing board) are Local, or (b) which are states, municipalities, government agencies, or public educational institutions. The directors and officers of a state-owned entity are inherently local.

* Local Funding Credit. A point should be awarded to applicants for which at least fifty percent (50%) of the expected funding for the station is from Local or public sources, which may include federal grant funding from Public Telecommunications Facilities Program of NTIA, Department of Commerce.

* Local Educational Presence Credit. A point should be awarded to established Local educational organizations which apply for a license. An "educational" organization should be defined by FCC rules and precedent an applicant eligibility. An "established" organization shall be an organization that has existed continuously for at least two years prior to filing of an application.

* Representativeness Credit. A point will be awarded to applicants (a) with board members who are leaders (i.e., officers or directors) of at least five different Local elements (e.g., businesses, civic groups, professions, religious groups, schools, government) or (b) which are states, municipalities, government agencies or public educational institutions or other educational institutions. With respect to the first criteria, one director cannot be considered to be a representative of more than one Local element.

2. Diversity of Ownership Credit.

The FCC should award credits as follows:

- * 2 points for applicants which own 5 or fewer stations in the same broadcast service.
- * 2 points for applicants which are states, municipalities, government agencies or public educational institutions. These entities have an mandate to serve the diverse interests and constituencies of their jurisdictions and, therefore, qualify for diversity on a "per se" basis.
- * 1 point for applicants which own 10 or fewer stations in the same broadcast service.

The FCC should award demerits as follows:

- * minus 2 points for applicants which own more than 25 stations in the same service.
- * minus 3 points for applicants which own more than 50 stations in the same service.

3. Spectrum Efficiency - Fair Distribution of Service Credits.

The FCC should award credits for:

- * 5 points for the first full-time NCE aural or first full-time NCE video service received by a significant population.
- * 2 points for the second full-time NCE aural or video service received by a significant population.
- * 1 point for the third full-time NCE aural or video service received by a significant population.
- * Technical Differences Credit. As suggested by the FCC, the FCC should award 1 point to an applicant proposing to serve 10 percent or greater area (not including bodies of water) and population than competing applications.
- * Facilities Improvement Credit. The FCC should award a point to an applicant proposing a major modification to its facilities in order to improve the technical service to its service area. For instance, an applicant may seek to move to an

adjacent frequency in order to reduce interference with a same-channel station, only to have another party with no ties to the community file a mutually-exclusive application. The applicant with a history of service to the community who is making an effort to improve technical service should receive a point in the proceeding.

C. Discussion of Proposed Point System and Rationale for Rejecting Alternatives

WCPR & RMPR support in full each aspect of the point system described above. The point system, which is modeled on the successful point system used for Instructional Television Fixed Service (ITFS) MXed applications, would select the "best qualified" applicant.

"Local" and "Diversity" Should be Separate Concepts. WCPR & RMPR believe that the FCC's proposal for local diversity credit does not adequately reflect the current circumstances of noncommercial broadcasting. For the past decade or so, public broadcasters seeking to bring service to unserved areas (or new service to an area already served by public broadcasting) have expanded regionally. In contrast, based upon review and analysis of the pending MXed applications referenced in the NPRM, other NCE entities (i.e., non-public broadcasters that qualify as NCE licensees) have filed applications on a nation-wide basis.^{6/} Thus, the FCC's proposal for "local diversity credit" could harm both localism and diversity. It favors non-local applicants which could own hundreds of stations across the country, over a local applicant which, for example, seeks to extend its signal to an outlying rural area, which it already knows and serves marginally with its signal (and which area has requested that the local applicant provide service there) if the proposed facilities have a small overlap with the applicant's current station.

^{6/} See Exhibit A, which lists noncommercial applicants who have filed 10 or more applications. This information was taken from data on the FCC's website referenced in Footnote 5, *supra*.

Moreover, some of WCPR & RMPR's member stations have developed "dual" program services (such as a News and Information Service and a Classical Music Service) in the same geographic area. Stations seeking to provide these dual services -- even state-wide broadcasters with a governmental mandate to serve the state's citizens, or local university broadcasters seeking to provide dual services to the university areas, or an area where the university operates an extension center -- would be disadvantaged under the local diversity credit. Thus, WCPR & RMPR believe that more a more detailed point system on separate "localism" and "diversity" criteria is necessary to ensure appropriate use of the reserved spectrum. The Commission should also address the issue of "national" ownership diversity among competing applicants, given the trend of national filers seeking NCE use of reserved channels.

Fair Distribution of Service -- Section 307(b). WCPR & RMPR support the Section 307(b) concept proposed by the Commission, modified as set forth above, to favor applications proposing first, second and third NCE aural or video service to a geographic area. There is ample case law on preferences for Section 307(b) to permit FCC staff to apply this criterion in the point system based on a standard areas and populations analysis.

However, WCPR & RMPR also believe that the Commission should not state this criterion in terms of "received in the community," but in terms of "geographic population served" in accordance with standard engineering areas and populations analysis. The Commission should not credit "first local transmission service" under Section 307(b) in any point system. Local transmission service is an important FCC goal, however, it is less important in the NCE

context, than in the commercial context.^{2/} Given the overall number of radio and TV broadcast stations, all but the smallest of communities have first local transmission service. Moreover, based upon a review of the Mxed NCE applicants on the FCC's website, WCPR & RMPR discern that there has been an increasing trend among NCE applicant to select a minuscule "community of license" (sometimes of 500 persons or less) in hopes of gaining a decisive Section 307(b) credit over an applicant proposing service to a larger community or area that needs first (or additional) public radio service. WCPR & RMPR believe that the applicants have no intention of providing "local service" to those minuscule communities.

Documentation. The Commission asked for comment on how best to document how NCE applicants would meet the proposed criteria to avoid "feigning." For the most part, to deter abuse, the FCC needs only to enforce current requirements on applicant qualifications swiftly and surely when deficiencies are pointed out. Based on their experience, WCPR & RMPR believe that legitimate petitions to deny applications (which, by statute, the Commission must consider) are necessary to winnow out abusive and speculative applications that do not comply with existing application requirements and Commission rules.

WCPR & RMPR believe that, after adoption of the rules in this proceeding, the Commission should open a settlement window for competing NCE broadcast applications for reserved channels as well as opportunities to file petitions to deny against unqualified applicants. WCPR & RMPR believe that, once some certainty is established about how the recipient of the frequency is selected, a number of pending Mxed application proceedings will

^{2/} See *New York University*, 10 RR2d 215 (1969).

be settled expeditiously, which will eliminate the necessity to devote staff resources to the "point system" determination.

However, the proposed point system would also require added measures of documentation. Stations must have the ability to analyze and challenge the proposals of other applicants. Therefore, WCPR & RMPR support the documentation proposed in the comments NPR, APTS and CPB, supplemented with its comments described below.

Any documentation supporting certifications in applications should be made available to competing applicants after the mutual exclusivity among the applicants is discovered. This documentation should include:

- * For Local Applicant Credit: Governing documents, including articles of incorporation, bylaws, location of headquarters and State-Wide Plans.
- * For Local Directors and Officers Credit: Lists of officers, directors or governing board members with primary residences listed.
- * For Local Funding Credit: Financial documentation sufficient to demonstrate compliance with the FCC's Financial Qualifications Standards,^{8/} supplemented by either the applicants's most recent annual audited financial statement as of the time the application is filed (which cannot be more than a year old), OR, the most recent IRS Form 990 of an applicant.
- * For Local Educational Presence Credit: Documentation demonstrating the date that the applicant was "established," such as certification from the Secretary of State in which the applicant was organized.
- * For Representativeness Credit: Resumes of each of the directors or advisor board members that meet the "representativeness" test, including dates and references that can confirm that the individual serves as a representative of a Local element.

^{8/} The Commission had ample case law on financial qualifications that it may use to determine if an applicant qualifies for a Local Funding Credit, if an issue is raised.

- * For Diversity Credit: List of media interests, including a chart of licenses and permits held, pending applications, interlocking directorships with other media interests.
- * General: Address of the proposed main studio location and public inspection file

These added documentation measures would not normally increase processing burdens on Commission staff, because the documentation would only become relevant if one applicant chose to challenge another applicant's "points." Based on the Commission's experience with the point system for ITFS applications, WCPR & RMPR do not believe that there will be many instances involved disputes about "points" awarded, if the point system is clearly and consistently applied.

Minority Control Credit. WCPR & RMPR do not believe that the minority control credit can properly be applied in the context of NCE MXed proceedings. For the reasons cited above in conjunction with the discussion rejecting lotteries, any minority control criteria would suffer constitutional infirmities based on the *Adarand* decision and would subject applicants to arbitrary rules about "control" of NCE applicants. However, WCPR & RMPR wish to point out that public broadcasters have a long history of providing programming that constitutes an expression of diversity and excellence and reaches out to underserved audiences, particularly children and minorities, in accordance with the statutory mandate of Section 396(a)(5) and (6) of the Communications Act.^{2/} WCPR & RMPR thus believe that the Commission's interest in fostering diversity of programming is furthered when it fosters a point system that encourages public broadcasters to compete for new broadcast stations.

^{2/} For example, the Joint Comments of APTS and NPR in MM Docket No. 95-31 at Footnote 11, described public broadcasting's efforts to serve minority audiences.

Tie Breakers. In the event of a tie, WCPR & RMPR support part of the tie-breaker solutions proposed by NPR, APTS and CPB in their comments -- the license should be awarded to the applicant with the fewest pending applications for new broadcast facilities in the same service at the time the subject application is filed. WCPR & RMPR believe that NPR, APTS and CPB's rationale supporting this tie-breaker is a valid one -- an applicant with many pending applications is likely to secure a license elsewhere, while the applicant with just one or two applications is likely to have determined that only these one or two frequencies will serve its purposes. However, WCPR & RMPR do not support a lottery as the ultimate tie-breaker. For the reasons advanced above, an appropriate lottery that complies with the statutory mandate on diversification and minority preference cannot be devised. Instead, WCPR & RMPR believe that the ultimate tie-breaker should be determined based on filing priority -- the tie should go to the "runner" -- the applicant who filed first.

Filing Windows -- WCPR & RMPR support the adoption of a window filing procedure, but only if the FCC's Rules would provide for at least quarterly windows. WCPR & RMPR believe that fewer than four filing opportunities each year will deny reasonable flexibility for NCE applicants seeking to respond to legitimate public need for noncommercial educational service. NCE service will likewise be throttled if the FCC allows the staff to delay opening windows so as to slow the flow of applications to a "manageable" trickle.

Under a window procedure, applicants for new NCE stations and for major changes on reserved channels could file their applications only during windows that would be announced at least 60 days in advance. At the close of a window, all acceptable applications on file would be cut off from later-filed competing applications.

The FCC would put the applications on public notice and accept petitions to deny, but not competing applications. Qualified applications not mutually exclusive with other applications would then be granted, while winners would be selected from among mutually exclusive applications pursuant to the proposed point-based selection process.

Ironically, two important goals -- increased efficiency and deterrence of speculative applications -- work to a significant degree at cross purposes with each other. The window procedure may possibly increase processing efficiency by eliminating some of the double processing characterizing the A/B window approach. It will also eliminate the problem of copy-cat mutually exclusive filings.

Having given a filing window idea careful consideration, WCPR & RMPR support the window filing procedure, but only if windows are opened on a relatively regular, frequent basis. WCPR & RMPR have come to believe that, for the most part, current FCC application requirements (supplemented by documentation for the point system, as suggested above) are sufficient to ensure that NCE applications are not "feigned." To deter abuse, the Commission would do well to enforce current requirements swiftly and surely in response to deficiencies pointed out by interested parties in petitions to deny. WCPR & RMPR are convinced that such enforcement, largely lacking heretofore, would quickly bring to heel any offenders and deter future offenders from feigning.

Share Time. WCPR & RMPR strongly oppose any kind of mandated time sharing arrangement for NCE broadcasters, including the suggested "negotiated" time sharing arrangement. Throughout the prior history of this proceeding (and its precursor in GC Docket 92-52), public broadcasters have been unanimously opposed to time sharing and this opposition

continues unabated. None of the comments in the prior history of this proceeding (or its precursor) have supported time sharing; the Commission's continued proposal of such arrangements is therefore quite puzzling. The absence of successful long-term time sharing arrangements is "per se" evidence that such arrangements are not workable. Particularly in a climate of reduced federal and state support for public broadcasting, the concept of forced sharing time is unreasonable, as the kind of audience support necessary to ensure long term successful operation cannot be built on a part-time basis.

Holding Periods. WCPR & RMPR believe that a properly crafted point system, that includes the "local funding criterion" proposed above to ensure effectuation of an applicant's proposal, obviates the need for a holding period. Still, WCPR & RMPR's experience suggests that a holding period, with appropriate exceptions, will not adversely affect NCE licensees that are committed to ensuring legitimate, long-term NCE service to an area.

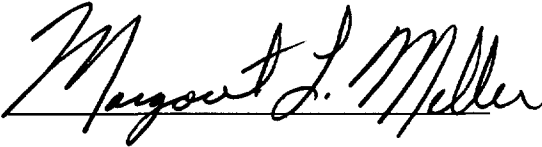
CONCLUSION

For these reasons, WCPR & RMPR support the point system described above as the best mechanism for deciding among NCE applicants for reserved NCE channels.

Respectfully submitted,

WEST COAST PUBLIC RADIO

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EXHIBIT A

**FM Educational Mutually Exclusive Broadcast Application Groups
Applicants with Ten or More Pending Applications**

Name of Applicant	Number of Applications Filed
American Educational Broadcasting	12
American Family Association	139
Bible Broadcasting Network, Inc.	10
Broadcasting for the Challenged, Inc.	78
CSN International	28
Educational Communications of Colorado Springs	10
Educational Media Foundation	29
Family Stations, Inc.	27
Moody Bible Institute of Chicago	13
Pensacola Christian College, Inc.	11
Stockton Christian Life College	11